Storto Sons Construction Co., Inc. *and* Bricklayers, Masons and Plasterers' Local Union No. 43 of the Finger Lakes Region. Case 3-CA-8448

March 30, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 12, 1981, Administrative Law Judge Jerry B. Stone issued the attached Supplemental Decision in this proceeding.[1] Thereafter, the Respondent and the Charging Party filed exceptions and supporting briefs; the General Counsel filed cross-exceptions and a supporting brief; and the Charging Party filed an answering brief to the Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge[2] and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Storto Sons Construction Co., Inc., Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] The Board's original Decision and Order in this case is reported at 245 NLRB 1360 (1979). It was enforced by entry of Consent Judgment by the United States Court of Appeals for the Second Circuit on March 5, 1980.

[2] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge: This proceeding to determine backpay, if any, due discriminatees Stephen M. Corcoran, Jr., Herman Davis, Philip DeSain, Harry J. Serrett, Jr., Dominick Vedora, and John Woznick, pursuant to the remedial order issued by the Board on September 28, 1979 (reported at 245 NLRB 1360, and as enforced by entry of consent judgment by the United States Court of Appeals for the Second Circuit on March 5, 1980), was held on January 5, 1981, in Rochester, New York.

Following such hearing, the parties have supplemented and/or clarified the record and positions taken by certain stipulations and exhibits which have been received into the record.

The issues concern (1) the reasonableness of the General Counsel's formula for establishment of constructive earning periods for the discriminatees, (2) whether, in relation to such reasonable formula, there would have been available jobs or work for the discriminatees after their application for work and discriminatory consideration therefor by the Respondent, and (3) the dates that the discriminatees and certain other employees applied for work and were either hired or discriminatorily considered for employment. The major issues concern (1) whether Davis applied for work before November 23, 1977, and when Serrett, Vedora, and Woznick applied for work with relationship to the time the Respondent determined to hire employees David, Jacobs, and Rago, and (2) whether, if jobs were not available at the time when the discriminatees applied for work, jobs would have been available at a later date.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by all parties and have been considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. BACKPAY DETERMINATIONS

A. *Philip DeSain and Herman Davis—the Laborers*

1. Philip DeSain

It is undisputed that Philip DeSain, a laborer, made application for employment on October 17, 1977. It is also undisputed that the Respondent did not employ any laborers until November 23, 1977. The General Counsel's backpay formula constructs that DeSain would have initially commenced working during the week ending November 23, 1977, and would have continued until he became disabled on June 28, 1978. The exhibit record relating to earnings of laborers reveals that there were 3 to 17 laborers employed during the weeks commencing on the week ending on November 23, 1977, and continuing to June 28, 1978.

As has been indicated, the Respondent disputes that a discriminatee would have been employed if there were

no positions available on the date of his application for hiring. In effect, this appears an attempt to relitigate the finding of discrimination in the underlying case. This defense is rejected. The General Counsel, where there has been a finding of discriminatory consideration, only has to establish a "reasonable" formula for determining backpay, if any. In the instant case it is clearly reasonable to believe that, absent strong and persuasive evidence otherwise, DeSain would have been employed, absent discriminatory considerations, when the first laborers were hired (during the week ending November 23, 1977) and would have continued as a laborer as long as laborers were employed and DeSain was able to work. The General Counsel has conceded in effect that DeSain became disabled on June 28, 1978, and there is no contrary evidence. Thus, the facts establish that the period for computing loss of earning[1] during the backpay period for DeSain commenced on November 23, 1977, and ended on June 28, 1978.

There is no dispute as to the appropriate measure of earnings that each laborer discriminatee, including DeSain, would have received for each week of discrimination. Such measure was alleged in effect and admitted to be the average gross earnings per week received by all laborers employed by Storto Sons Construction Co., Inc., during each week of the backpay period of the discriminatees, excepting foremen and employees who worked less than 24 hours per week when the scheduled workweek was 5 days or more. It is undisputed and clear that the General Counsel has used such measure of earnings in computing DeSain's gross earnings during the backpay period.

The General Counsel has conceded certain interim earnings for DeSain during the backpay period. The Respondent, whose obligation is to establish offsets such as interim earnings, has presented no evidence of interim earnings.

The General Counsel's backpay computations have used the above referred measure of earnings for gross earnings and has subtracted from said gross earnings the conceded interim earnings to determine the net backpay due DeSain on a quarterly basis. Considering such formula, I conclude and find that such formula is a reasonable and proper formula for the determination of backpay for DeSain.

There is no dispute as to the mathematical accuracy of the General Counsel's computations. The formula and computations are hereby found to be reasonable and correct to reflect, as set out below, the determined net backpay[2] due DeSain as follows:

Quarter	*Gross Earnings*	*Net Interim Earnings*	*Net Backpay*
1977-4th	$1,270.00	$ 0	$1,270.00
1978-1st	3,662.67	1,615.05	2,047.62
1978-2d	4,598.35	3,168.41	1,429.94

[1] DeSain's backpay period actually commenced on October 17, 1977, but under the formula used, it is assumed that actual potential backpay loss did not begin until the week ending November 23, 1977.

[2] With interest thereon as set out later herein.

2. Herman Davis

It is undisputed that Herman Davis, a laborer, made application for employment in late November 1977. The General Counsel alleges and contends that Davis' backpay period commenced during the week ending November 23, 1977, and ended on November 22, 1978. The Respondent disputes whether Davis would have received employment since it was uncertain when Davis actually applied for work. Essentially, for the same reasoning set forth with respect to DeSain, such contention is rejected.

The exhibits and testimony reveal that Davis applied for work in late November 1977, that laborers were employed from during the week ending November 23, 1977, to November 22, 1978. At the hearing the General Counsel and the Respondent stipulated that if Davis did not apply for work before November 21, 1977, that the next laborer employees employed after the week ending on November 23, 1977, were initially employed during the week ending on January 11, 1978.[3]

The formula utilized for determining gross earnings is the same found appropriate for the backpay determination for DeSain. The General Counsel's computations contain conceded interim earnings. The Respondent's burden is to establish offsets such as interim earnings. The Respondent, however, has presented no additional evidence as regards interim earnings by Davis. There is no dispute as to the General Counsel's mathematical computations.

The only real issue is when the potential period for backpay earnings commenced. The General Counsel has not established that Davis applied for employment prior to the hiring of laborer employees who initially worked during the week of November 23, 1977. The General Counsel has established, in view of the manner of litigation of the issues, that Davis applied for work before laborer employees who were initially employed during the week ending January 11, 1978. Accordingly, the evidence is sufficient only to establish a period[4] for backpay earnings commencing during the week ending January 11, 1978, and continuing to and ending on November 22, 1978.

In connection with the foregoing, I have considered the Charging Party's contention that the uncertainties of the date when Davis applied for work should be resolved against the Respondent. I do not find it appropriate to draw an adverse inference against the Respondent to determine the commencement of a period of discrimination or of constructive earnings for Davis. The determination of the commencement of such period is not a matter solely within the knowledge of the Respondent. Conceivably, the determination of when Davis applied for work with respect to the time of hiring of laborers

[3] Although the Charging Party did not join in such stipulation, no evidence was presented to show facts contrary to the stipulation. Thus, construing Respondent counsel's stipulation in the nature of an admission, the evidence is only sufficient to establish that Davis would have been employed initially, absent discrimination, during the week ending January 11, 1978.

[4] Davis' backpay period actually commenced in late November 1977, but, under the formula used, it is assumed that actual potential backpay loss only commenced during the week ending January 11, 1978.

could have been established by witnesses other than the Respondent's witnesses.

Considering the foregoing and determining that the formula used is appropriate, the backpay due[5] Davis is found as indicated below:

Qtr. 1978	*Gross Earnings*	*Net Interim Earnings*	*Net Backpay*
1st	$3,442.67[6]	$ 0	$3,442.67
2d	4,598.35	1,918.68	2,679.67
3d	5,610.34	2,848.28	2,762.06
4th	3,530.23	0	3,530.23

II. BACKPAY DETERMINATIONS

B. *Stephen M. Corcoran, Jr., Dominick Vedora, John Woznick, and Harry J. Serrett, Jr.—The Masons*

1. Stephen M. Corcoran, Jr.

It is undisputed that Stephen M. Corcoran, Jr., a mason discriminatee, applied for work with the Respondent in mid-December 1977. The General Counsel's backpay formula accords Corcoran wages as if he had constructively commenced work during the week ending January 4, 1978, and worked until March 13, 1978, when the Respondent actually employed Corcoran. It is undisputed that masons were initially employed during the week ending January 4, 1978, and were employed during all of the weeks ensuing between the week ending on January 4, 1978, and March 13, 1978. The Respondent disputes that Corcoran would have been employed before March 13, 1978, since masons were not employed during the week that Corcoran applied for work and masons only commenced working during the week ending January 4, 1978. As indicated, in effect the Respondent appears to be attempting to relitigate the finding of discrimination in the underlying case. This defense is rejected. The General Counsel, where there has been a finding of discriminatory consideration, only has to establish a "reasonable" formula for determining backpay, if any. In the instant case it is clearly reasonable to believe that, absent strong and persuasive evidence otherwise, Corcoran would have been employed, absent discriminatory considerations, when the first masons were hired during the week ending January 4, 1978, and would have continued such employment until the time he was employed on March 13, 1978. Thus, the facts establish that the period for computing loss of earnings[7] commenced during the week ending January 4, 1978, and continued to March 13, 1978, when he was employed by the Respondent.

There is no dispute as to the appropriate measure of earnings that each mason discriminatee, including Corcoran, should have received for each week of discrimination. Such measure was alleged in effect and admitted to be the average gross earnings per week received by all masons employed by Storto Sons Construction Co., Inc., during each week of the backpay period of the discriminatees, excepting foremen and employees who worked less than 24 hours per week when the scheduled workweek was 5 days or more. It is undisputed and clear that the General Counsel has used such measure of earnings in computing Corcoran's gross earnings during the backpay period.

It is further clear that the General Counsel's formula accorded Corcoran gross earnings for the weeks ending January 4, 1978, and to March 13, 1978, on the basis that he would have received such earnings during the weeks that newly hired masons[8] worked. Considering the formula as alleged and statements by counsel at the hearing, this is the formula the parties appeared to have understood to have been used with respect to the computations for gross earnings for all of the mason discriminatees. Whether this is so or not, the matter has been litigated, and the record as a whole reveals such to be a reasonable method for determining backpay. I conclude and find that such formula is a reasonable and proper formula for the determination of backpay due Corcoran.

The Respondent has the burden of establishing offsets to gross earnings. In this case, no evidence has been presented to reveal offsets (interim earnings) to the gross earnings. There is no dispute as to the accuracy of the computations used with respect to the determination of backpay due Corcoran. I find, however, an inadvertent error whereby Corcoran was granted 2 days' instead of 3 days' gross earnings for the week ending March 15, 1978, and in which he was reinstated on March 13, 1978.

Accordingly, the backpay due[9] Corcoran is as follows:

Qtr. 1978	*Gross Earnings*	*Net Interim Earnings*	*Net Backpay*
1st	$3,211.11[10]	$0	$3,211.11

1. Dominick Vedora, John Woznick, and Harry J. Serrett, Jr.

The General Counsel alleges, and the Respondent denies, that Dominick Vedora, John Woznick, and Harry

[5] With interest thereon as set out later herein.

[6] It should be noted that the General Counsel's computations for the first quarter had total gross earnings of $3,662.67. This, however, included $220 earnings for the week ending January 4, 1978, which does not come within the backpay period as potential gross earnings.

[7] Corcoran's backpay period actually commenced in mid-December 1977, but, under the formula used, it is assumed that actual potential backpay loss only commenced during the week ending January 4, 1978.

[8] Masons who appeared on the payroll during the weeks following the date that Corcoran applied for work and who it reasonably could be construed were hired after Corcoran applied for work.

[9] With interest thereon as later set out herein.

[10] The General Counsel's specifications set forth that Corcoran would have received the average gross earnings of a mason for the weeks ending January 4 through March 8, 1978, and two-fifths of such earnings for the week ending March 15, 1978. Thus, the earnings for the week ending March 15, 1978, were computed as $141.20. In fact there were 3 workdays out of 5 that Corcoran was entitled to backpay (March 9, 10, and 11, 1978), and thus he was entitled to have constructively earned three-fifth times $353 or $211.80 for the week ending March 15, 1978. With such adjustment, Corcoran's gross earnings for the first quarter should be computed to be $3,211.11 instead of the $3,140.51 as set forth in the General Counsel's computations.

J. Serrett, Jr., mason discriminatees, applied for employment on March 6, 1978. The issue was confused by errors in the pleadings and by testimony given in the underlying unfair labor practice case. However, a composite of the credited aspects of the testimony of Vedora, Woznick, Serrett, and Paone[11] establishes that Vedora and Woznick applied for work on the morning of March 6, 1978, and that such applications were made at the same time. Serrett's credited testimony reveals that his application for employment occurred on March 6, 1978, but after the applications for work by Vedora and Woznick.

The Respondent disputes that Vedora, Woznick, or Serrett would have been employed. The Respondent avers that there were no jobs available when each applied for work. As indicated, this dispute in part constitutes a relitigation of the discriminatory findings in the underlying case. The General Counsel's formula in this case is based on a theory that the mason discriminatees would have performed the work performed by masons whose names initially appeared on the Respondent's payroll after the date of the mason discriminatees' applications for employment. The Respondent's defense is rejected except to the limited extent set forth as follows. The General Counsel, where there has been a finding of discriminatory consideration of applicants for employment, only has to establish a "reasonable" formula for determining backpay, if any. In the instant case the General Counsel's formula envisions that employees Rago, David, and Jacobs would have been employed only after the mason discriminatees (Vedora, Woznick, and Serrett) had there been no discrimination. The overall facts reveal, in my opinion, that Rago, in the absence of discriminatory considerations, would have been employed prior to Vedora, Woznick, or Serrett. The facts are clear that Rago sought work on Friday, March 3, 1978, and delayed going to work until he checked with the Union.

As has been indicated, the facts reveal that Vedora, Woznick, and Serrett spoke to Paone on March 6, 1978, and made application for employment thereby.[12] In dispute is whether the Respondent had decided to hire David and Jacobs prior to the time that Vedora, Woznick, and Serrett made application for employment.

The facts reveal that Respondent as a general practice hires on a first-come-first-serve basis. This being so, it is proper to infer from the conversation held by Paone with Vedora, Woznick, and Serrett on March 6, 1978, that jobs were available and that they would have been hired at such time or immediately thereafter but for the discriminatory policy of hiring utilized by the Respondent. Thus, it follows that the foregoing establishes a *prima facie* case the the Respondent would have employed Vedora, Woznick, or Serrett before the employment of David or Jacobs or other masons who commenced work on March 7, 1978, or other masons hired thereafter. Respondent's evidence, presented through testimony of Vangelisti and Paone, as to the timing of the hiring of David and Jacobs, is of such a nature that it does not rebut the above referred to *prima facie* case relating to timing of employment or consideration for employment. In fact, the confusing and contradictory testimony of Vangelisti and Paone warrants the drawing of an inference that David and Jacobs were hired after the time of the applications for work by Vedora, Woznick, and Serrett on March 6, 1978.

Thus, Vangelisti testified that he hired both David and Jacobs on March 5, 1978, and that he called David and Jacobs on the night of March 5, 1978, to report to work on March 6, 1978. Later, Vangelisti testified that he hired *Jacobs* on the spot on the job on March 6, 1978. Later, Vangelisti testified to the effect that he could have hired David and Jacobs on March 7, 1978, that Jacobs went to work when he hired him because he had tools with him, and that maybe Jacobs was hired one day and went to work the next day. Other than the above, it is sufficient to say that Vangelisti's testimony as to the hiring of Jacobs and David appeared confused and somewhat contrived.

Paone in his testimony indicated that he thought that Vangelisti told him on March 6, 1978, that he had hired two masons (David and Jacobs). Paone testified that Vangelisti told him on March 6, 1978, that he had hired "the guys" (David and Jacobs) and that they were coming in that morning.

Considering all of the facts and the logical consistency of the evidence, I am persuaded that Vangelisti's testimony that he hired Jacobs on the spot and on the job and that Jacobs had his tools is credible. Such credited facts, coupled with the evidence that Jacobs' first date at work was March 7, 1978, convince me and I conclude and find that the Respondent hired Jacobs on March 7, 1978. Similarly, I credit Vangelisti's testimony to the effect that he called someone and left word for David on the night before David reported to work. Again the evidence reveals that David's first date of work was March 7, 1978. In sum, the credited facts reveal that Vedora, Woznick, and Serrett applied for work before the Respondent hired David and Jacobs.

The General Counsel's formula for determining the weeks that mason discriminatees Vedora, Woznick, and Serrett would have worked if they had not been discriminatorily considered for employment envisioned that the discriminatees would have been entitled to work during the potential backpay period dependent on the order of the timing of their applications for work and the number of newly hired employees who worked during such period. It is clear that the General Counsel's formula was postulated upon the assumption that the number of newly hired employees who worked during such weeks of the backpay period reflected that there was available work that would have been performed by the discriminatees absent discrimination against them, and that the work was of such an amount that determination

[11] Paone was the Respondent's general foreman on the job.

[12] There is in effect a dispute between the testimony of Vedora, Woznick, and Serrett and the testimony of Paone as to what was said. I credit the testimony of Vedora, Woznick, and Serrett over the testimony of Paone and discredit Paone's testimony to the effect that he told Vedora, Woznick, and Serrett that the Respondent had already hired three masons, that the Respondent would get hold of them later if it needed any employees. This credibility resolution is based on a consideration of the litigated findings in the underlying proceeding, the testimony of the witnesses in the instant proceeding, and a consideration of the logical consistency of all facts in relation thereto.

of the average gross earnings for such period of backpay as an appropriate measure of constructive earnings was proper. No dispute was raised as to this contention. The appropriateness of the measure of gross earning was admitted in the pleadings and is not in issue.

The General Counsel's formula, as written and as orally expressed, merely sets forth a formula relating to whether the number of masons during the backpay period exceeded the number of masons during the prebackpay period. An examination of all of the exhibits reveals that the General Counsel's formula, as generally applied, accorded discriminatees constructive earnings during the backpay period when available work was revealed by evidence of work performed by masons who were hired subsequent to the application for work by the discriminatees. It appears that the parties understood the General Counsel's formula as explicated above. Whether this is so or not, the matter has been litigated, and the record as a whole reveals such to be a reasonable method for determining backpay, if any, due to Vedora, Woznick, and Serrett.

Although the General Counsel in effect has utilized the above-described formula in determining backpay due Vedora, Woznick, and Serrett, the computations for such backpay were based on the General Counsel's assumption that Vedora, Woznick, and Serrett made application for work before the Respondent employed Rago, David, and Jacobs. Further, the General Counsel, in computations, construed that Corcoran, also a discriminatee, would have had priority in filling work slots held by newly hired employees.

As a general principle, the formula determination was to the effect that there were available constructive earnings to be accorded to discriminatees when newly hired mason employees[13] worked, that such constructive earnings were to be accorded the discriminatees depending on the number of work positions held by newly hired mason employees and in accordance with a preferential order of preference based on the timing of application for work by the discriminatees. Thus, if *one* newly hired mason employee worked during a backpay period week when Corcoran and the other three mason discriminatees were entitled to be made whole for lost wages, constructive average earnings for one mason employees were to be accorded to Corcoran. If two newly hired mason employees worked during the same above-referred-to period, constructive average earnings for one mason employee were to be accorded to Corcoran and constructive average earnings for one mason employee were to be accorded to Vedora and Woznick on the basis that Vedora and Woznick should receive one-half the constructive average earnings for one mason employee.[14] If three newly hired mason employees worked during the same above-referred-to period, constructive average earnings for one mason employee were to be accorded respectively to Corcoran, Vedora, and Woznick. Similarly, if four newly hired mason employees worked during the same above-referred-to period, constructive average earnings for one mason employee were to be accorded respectively to Corcoran, Vedora, Woznick, and Serrett. During the period of time of Vedora's, Woznick's, and Serrett's backpay period and when Corcoran had already been reinstated, the same principles as modified with the exclusion of Corcoran as a discriminatee constituted the basis for determination of backpay constructive earnings. Thus, during weeks wherein only one newly hired mason employee worked, constructive earnings for one mason employee were accorded to each Vedora and Woznick on a one-half share basis. If two newly hired mason employees worked, constructive earnings for one mason employee accorded to each Vedora and Woznick. If three newly hired mason employees worked, constructive earnings were accorded respectively to Vedora, Woznick, and Serrett.

The above, as a general principle, reflects a reasonable and proper means of determining constructive earnings for the discriminatees. However, where there is an unusual-type week because such is the commencement or ending of a potential backpay period, such time period of discrimination should not be disregarded because the newly hired mason employees worked only part of the week. It is noted that the General Counsel prorated the gross earnings due to Corcoran when Corcoran's reinstatement occurred in the middle of a workweek.

Because of the factfinding herein that Rago, if there had been no discriminatory considerations, would have been employed prior to Vedora, Woznick, and Serrett, and because of the type of record established in this case, computations for backpay determinations for Vedora, Woznick, and Serrett will have to be set forth in some detail.

The Charging Party disputes the commencement date for computation of backpay and contends that gross earnings for backpay for Vedora, Woznick, and Serrett should have commenced on March 7, 1978, the date that Rago, David, and Jacobs first were employed. In principle I find merit to such contention. Similar to the proration of Corcoran's gross earnings, discriminatees Vedora, Woznick, and Serrett should be accorded gross earnings, if proper, for the days of March 7 and 8 on a prorated basis.

The General Counsel's backpay specifications had attached thereto various exhibits and computation sheets. Exhibit 1 was a document setting forth reference to certain time periods and the number of masons (and names) who were on the payroll during such time periods who had been on the payroll before Vedora and Woznick had applied for work. Similar information thereon related to time periods and the number of masons (and names) who were on the payroll during respective time periods who had been on the payroll before Serrett applied for work. Exhibit 2 related to laborers and to various weeks commencing with the week ending November 23, 1977, and ending with the week ending on November 22, 1978, with information as to the "average gross wages for week" and number of employees for each week thereon. Exhibit 3 had similar information relating to masons commencing with the week ending January 4, 1978, and ending with the week ending on October 25, 1978. Ex-

[13] Hired after the discriminatees had applied for work.

[14] Vedora and Woznick applied for work at the same time, and each was equally entitled with the other in time preference for awarding of constructive earnings.

hibits 4 through 9 related to the discriminatee laborers and masons and their gross earnings per week, interim earnings, net backpay, and quarterly summary thereof.

The parties have further presented stipulations and exhibits into the record subsequent to the hearing to reveal the names of mason employees hired by the Respondent and their starting and ending dates, to reveal the dates that employees worked for the Respondent on the job involved, to correct some inadvertent mathematical errors in computations, and to modify some positions previously taken by the parties.

Based on facts warranted by the pleadings and lack of dispute thereto and a composite evaluation of all of the facts, exhibits, and stipulations as referred to above, the facts relating to the availabilty of work for mason discriminatees and the computation of gross earnings may be set forth as follows:

The record reveals that during the week ending March 8, 1978, mason employees worked on March 2, 3, 6, 7, and 8, 1978. The average gross wages for mason employees for such 5-day week were $336. The record reveals that mason employees Burgess, Smallidge, and Lenhart had been hired by early January 1978. Smallidge appeared on the payroll for the last time as of March 3, 1978. Based on a consideration of the entire record, it is inferred that Smallidge worked at least 24 hours during the week prior to his last day of work on March 3, 1978.[15]

Burgess and Lenhart continued as employees after March 8, 1978, until a much later date. The facts reveal that the exhibit setting forth the summary of average gross wages for mason employees indicated that this was based on the earnings of three masons (who met the qualifications of those whose earnings should be used for computation) for the week ending March 8, 1978. The facts also reveal that mason employees David and Jacobs were hired after mason discriminatees Vedora, Woznick, and Serrett applied for work. David and Jacobs started to work on March 7, 1978. Thus, March 7, 1978, is the date to be used for computing the commencement of potential gross earnings for Vedora, Woznick, and Serrett. It is clear that there were 2 days during the week ending March 8, 1978, that the discriminatees could have worked.

Since the average gross earnings have been determined on a formula basis, the constructive earnings should be determined on the basis that there were two positions (that of newly hired mason employees David and Jacobs) available for the mason discriminatees on March 7 and 8, 1978. Corcoran, who had not been reinstated on March 7 and 8, 1978 (and for whom this proceeding has determined the backpay due him until the date of his reinstatement on March 13, 1978), is deemed constructively to have filled one of such two mason positions on March 7 and 8, 1978. Vedora and Woznick, who applied for work at the same time, have equal entitlement to the work reflected by the remaining positions available for accordance to the mason discriminatees. Thus, Vedora and Woznick are entitled to constructive gross earnings for one-half a day each on March 7 and on March 8, 1978. Thus, Vedora is entitled to constructive earnings for 1 day (1/5 x $336) in the amount of $67.20 for the week ending on March 8, 1978. Similarly and on the same basis Woznick is entitled to constructive gross earnings in the amount of $67.20 for the week ending on March 8, 1978. The facts reveal that there would not have been mason work available for Serrett, and therefore no constructive earnings are to be accorded Serrett for the week ending on March 8, 1978.

As to the record relating to the workweek ending on March 15, 1978, the following should be noted. The overall record is suggestive but not conclusive that contended newly hired mason employees Rago, David, and Jacobs worked during such week, that the General Counsel's backpay specification deemed that Corcoran constructively filled one of the mason positions available for backpay purposes for the discriminatees, and that Vedora and Woznick were entitled to constructively fill the other two mason positions revealed to have been available for constructive determination of backpay.

The facts reveal that Rago should not be considered to be a newly hired mason employee for the constructive determination of backpay. The overall record is sufficient to establish that one newly hired mason worked during the week ending March 15, 1978, for 24 hours or more, and it is clear that at least one position was available for constructive determination of backpay. The overall record is not sufficient to determine whether or not there were two newly hired mason employees who worked during the week ending March 15, 1978, and that there were two positions available for constructive determination of backpay.

The problem with the record has been created by the respective parties taking an all-or-nothing approach concerning their contentions and the failure to submit details and specifications as well as requested stipulations concerning the names of masons who worked during each week of the backpay period. There comes a time when litigation should end. The necessary details to determine the appropriate gross earnings for the week ending on March 15, 1978, should not be in dispute. Since this matter should not be delayed further and needless expense to the parties and to the Government should be avoided, I shall issue an appropriate order as to the computation of the gross earnings for the week ending on March 15, 1978.[16]

Thus, the Respondent will be directed to ascertain whether or not David and Jacobs worked during the week ending March 15, 1978, for 24 hours or more, and, if so, compute the backpay due Vedora and Woznick as follows: If only one of the two, David or Jacobs, worked for 24 hours or more during the week ending March 15, 1978, Respondent should deem that there was one mason position available for constructive gross earnings for the days March 9, 10, 11, 13, and 15. The Respondent should further deem that Corcoran would have been considered to have constructively filled said position on March 9, 10, and 11, 1978, and that Vedora and

[15] In the specifications, the General Counsel, with respect to the week ending on March 8, 1978, only sought to establish that one mason discriminatee, Corcoran, was entitled to gross earnings for backpay purposes.

[16] *J.S. Alberici Construction Co., Inc.*, 249 NLRB 751 (1980).

Woznick[17] were entitled to share in the same position for the work performed on March 13 and 15, 1978. Accordingly, if only one of the two, David or Jacobs, were employed for 24 hours or more, during the week ending March 15, 1978, Vedora and Woznick were each entitled to constructive average gross earnings for 1 day. Since the average gross earnings for the week ending March 15, 1978, was $353, and since there were 5 days of work in said week, 1 day's average gross earnings would be computed to be $70.60. If only one newly hired employee, either David or Jacobs, worked during the week ending March 15, 1978, the Respondent should compute the gross earnings for Vedora and Woznick for such week to be $70.60.

If the Respondent ascertains that both David and Jacobs worked for 24 hours or more during the week ending March 15, 1978, it should be deemed that there was, in addition to the available position and constructive earnings of $70.60, one other available mason position and constructive earnings in the amount of $353 and that Vedora and Woznick were entitled to share the same and each receive $176.50 constructive earnings therefrom or total constructive earnings each in the amount of $247.10.

If the Respondent were to ascertain that one newly hired mason employee (David or Jacobs) worked for 24 hours or more and that the other newly hired employees worked less than 24 hours during the week ending March 15, 1978, the Respondent should deem that Vedora and Woznick are entitled to constructive earnings as determined of $70.60 plus the following constructive earnings as determined in the manner herein set forth. Respondent is to determine whether a newly hired mason employee (David or Jacobs) did not work or, if he worked, whether he worked less than 24 hours for the week ending March 15, 1978. If said mason employee worked less than 24 hours, determination of the number of days or one-half days to the closest approximation should be made. Based upon this determination average gross earnings at the rate of $70.60 per day for such position should be made, and Vedora and Woznick should be deemed each to have had constructive earnings in one-half such amount.[18] Such should then be added to the amount of $70.60 previously determined as constructive gross earnings for each's gross earnings.

The overall record clearly establishes that the only newly hired mason employees, David and Jacobs, worked for 24 hours or more during the week ending March 22, 1978, that therefore there were two mason positions available for the discriminatees, that Vedora and Woznick, because of the timing of their applications for employment, were entitled to such positions for the purpose of determination of constructive gross earnings. Accordingly, Vedora and Woznick are deemed to have each been entitled to constructive gross earnings for the week ending March 22, 1978, in the amount of $341.66.

The overall record is only sufficient to reveal that one newly hired mason employee, either David or Jacobs, had earnings utilized in the computation of average gross earnings for masons for the week ending March 29, 1978. This being so, it is clear that the record is sufficient to establish there was at least one available mason position for constructive determination of gross earnings for backpay purposes. Since Vedora and Woznick applied for work at the same time, each is entitled to share with the other constructive gross earnings when there is established only that there existed one available mason position that should have been filled by a discriminatee. The average gross earnings for a mason for the week ending March 29, 1978, was $227. Accordingly, if only one mason position is established to be available for constructive backpay purposes, gross earnings for backpay purposes should be accorded Vedora and Woznick in the amount of $113.50.[19]

The General Counsel's brief indicates that David was the newly hired mason employee whose earnings were included in the overall computations for average gross earnings for masons, and that Jacobs' earnings were not included in such computations. It should be noted that the General Counsel's brief does not constitute evidence. However, since the record reveals that Jacobs ceased employment on March 29, 1978, since there exists a variance in the computations as regards the contended average gross earnings figures of $116.87 and one-half of $227 or $113.50, and since General Counsel's Exhibit 3 reveals obvious erasures or corrections, I find it proper to order that the Respondent ascertain whether or not Jacobs' earnings were utilized as a part of the computations for average gross earnings for masons for such period. If so, the Respondent is to further ascertain whether or not Jacobs worked during the week ending March 29, 1978. If so, the Respondent is to determine the number of days or one-half days or closest approximation thereto that Jacobs worked. The Respondent used masons on 3 days during the week ending March 29, 1978. The average gross earnings for said week was $227. On a prorated basis per day, the average gross earnings were $75.66. Upon the determination of days worked by Jacobs, if any, and determination of average gross earnings thereto on the basis of $75.66 per day, the Respondent is to deem Vedora and Woznick equally en-

[17] Vedora and Woznick applied for work at the same time and are deemed equally entitled on a time principle to work that would have been available to the discriminatees.

[18] The General Counsel's brief, which is not in evidence, refers to named masons as being the employees constituting the number of employees set forth in Exh. 3 relating to computation of average gross wages (or earnings). It appears, but not detailed enough for a finding, that the number of employees referred to on such exhibit constitutes a reference to masons who worked 24 hours or more and who were not foremen during the weeks in which the scheduled workweek was 5 days or more. If this be correct, it would appear clear that *both David and Jacobs* worked during the week ending March 15, 1978, and that Vedora and Woznick each should be accorded constructive gross earnings in the amount of $247.10 for the week ending March 15, 1978.

[19] The pleadings establish that the average gross earnings for masons for the week ending March 29, 1978, was $227. I note that the General Counsel alleges, the Respondent denies, and there was no evidence presented to support the General Counsel's contention that Vedora and Woznick should each receive $116.87 as *shared gross* earnings. Perhaps this was in error, or perhaps the General Counsel computed "earnings" based on the theory that David worked for 24 hours or more during the week ending March 29, 1978, and that Jacobs, who left employment on March 29, 1978, worked a day or two or less. In any event, my Order herein will take care of possible work by Jacobs that would have been available to the mason discriminatees.

titled to one-half of such amount, and the same is to be added, if any, to the previously determined $113.50 gross earnings for each.

The overall record reveals that the only newly hired mason employees who worked between March 30 and May 17, 1978, were David and Cataldi. Further, the overall record reveals that David and Cataldi worked during each week during the period between March 30 and May 17, 1978, and worked for sufficient hours so as to have their earnings included in the earnings used for computing the average gross wages or earnings for the week ending on April 5, 1978, and weeks thereafter to and including the week ending on May 17, 1978. It is thus clear that there were two mason positions available for determining constructive gross earnings for two discriminatees. Vedora and Woznick, being the discriminatees who applied together and before Serrett, are clearly entitled to constructive gross earnings on the basis of such available constructive work for two mason discriminatees. Accordingly, each should be accorded the average gross wages of masons as gross earnings for the week ending on April 5, 1978, and thereafter to and including the week ending on May 17, 1978.

The overall record reveals that the facts at least establish that one newly hired mason employee, either David or Cataldi, worked 24 hours or more so as to qualify that his earnings be included in the earnings used for computing the average gross wages or earnings for the week ending May 24, 1978. Thus, it is clear that at least one mason position was available for constructive filling by the discriminatees for purposes of backpay computation. Thus, it is clear that Vedora and Woznick are equally entitled to be accorded the gross earnings reflected by such available mason position. Thus, $568 or $284 is at least to be accorded to each Vedora and Woznick as gross earnings for the week ending May 24, 1978.

The record suggests but does not clearly establish that there were two newly hired mason employees, David and Jacobs, who worked for 24 hours or more so as to qualify that their earnings be included in the earnings used for computing the average gross wages of earnings for the week ending May 24, 1978. The Respondent will be directed to ascertain whether both David and Jacobs worked for 24 hours or more during the week ending on May 24, 1978. If so, it is clear that there existed two mason positions available for constructive filling by the discriminatee masons for gross earnings for backpay purposes. If so, Vedora and Woznick each should be accorded $568 gross earnings for the week ending May 24, 1978.[20]

If the Respondent's ascertainment of the work record of David and Jacobs reveals that one of such newly hired mason employees worked for 24 hours or more and that the other worked less than 24 hours for the week ending May 24, 1978, a determination should be made of the time worked by the newly hired employee who worked less than 24 hours for the week ending on May 24, 1978. Such time should be determined as approximately close to a time interval of a day or days. Since Respondent worked 6 days in such week, $94.33 should be multiplied by the number of such approximate days and the resultant figure deemed to be gross earnings shared by Vedora and Woznick. In such case the gross earnings for each Vedora and Woznick should be computed to be $284 plus one-half the constructive gross earnings otherwise computed.

The record clearly reveals that two newly hired mason employees, David and Cataldi, worked sufficient hours to require that their earnings be included in the computations for average gross earnings of masons herein for the week from the week ending on May 31 to and including the week ending on July 19, 1979. Thus, it is clear that there were two mason positions available during such weeks for constructive filling by mason discriminatees, that Vedora and Woznick were the discriminatees entitled to have average gross earnings for each week for backpay purposes, and that such should be accorded to them.

The record is clear that one newly hired mason employee, either David or Cataldi, worked for sufficient hours to have his earnings included in the earnings for computation of the average gross earnings for the weeks commencing with the week ending on July 26 and to and ending with the week ending August 16, 1978.[21] Thus, it is clear that one mason position was available for constructive filling by a mason discriminatee. Since Vedora and Woznick were the first (of Vedora, Woznick, and Serrett) to apply for work, Vedora and Woznick are deemed equally entitled to share constructive gross earnings for each of the weeks commencing with the week ending on July 26 and to and including the week ending August 16, 1978.

The evidence is insufficient to reveal that any newly hired mason employee worked during the week ending August 23, 1978. The General Counsel and the Charging Party had in effect contended that mason employee Rago was a newly hired employee and that Vedora and Woznick were entitled to share the average gross earnings for one mason position. The facts as found establish that Rago would have been hired bofore Vedora, Woznick, or Serrett had there been no discriminatory consideration in hiring.

The record reveals that newly hired mason employee David worked for sufficient hours to have his earnings included in the earnings used for computing the average gross wages of masons for the week ending September 6, 1978. This being so and in accordance with the reasoning set forth beforehand herein, it is found that constructive gross earnings in the amount of $170 are to be accorded each Vedora and Woznick for the week ending on September 6, 1978.

[20] The General Counsel's brief alludes to the fact that both Jacobs and David were masons whose earnings were included in the computations of average gross earnings for the week ending May 24, 1978. If this is so, it would appear to be clear that Vedora and Woznick should be accorded $568 gross earnings for the week ending May 24, 1978.

[21] The General Counsel's brief alludes to David's stopping work on July 19, 1978, and recommencing work on September 6, 1978. No evidence was presented as to such point. It is clear, however, that the facts only established the availability of one such mason position held by newly hired employees, either David or Cataldi, for the weeks indicated above.

The record reveals that two newly hired mason employees, David and Rowe, worked sufficient hours to qualify for having such earnings included in the earnings used for computing the average gross wages of masons for the weeks ending on September 13 and 20, 1978. In accordance with reasoning previously set forth, Vedora and Woznick are to be accorded the average gross wages for masons for such said weeks as constructive gross earnings for such weeks.

The record is sufficient to establish that one newly hired mason employee, either David or Rowe, worked during the week ending September 27, 1978, that such employee worked for sufficient hours to warrant inclusion of his earnings in the computation for average gross earnings.[22] It follows that there is established one available mason position for constructive filling by the discriminatees. In accordance with reasoning previously expressed, Vedora and Woznick are equally entitled to said work, and one-half of the average gross wages of masons for such work is accorded each Vedora and Woznick for backpay purposes.

The record reveals that two newly hired mason employees, David and Rowe, worked sufficient hours to warrant inclusion of their earnings in computations for the average gross wages of masons for such week during the weeks ending on October 4, 11, and 18, 1978. In accordance with reasoning previously expressed, Vedora and Woznick each are to be accorded the average gross wages of masons for such weeks as constructive gross earnings for such weeks.

The record reveals that one newly hired mason employee, Rowe, worked sufficient hours to warrant inclusion of his earnings in computations for average gross wages for the week ending October 25, 1978. Thus, it is established that one mason position was established as available for constructive filling by discriminatees. In accordance with reasoning previously expressed, Vedora and Woznick, each, are to be accorded one-half of the average gross wages of masons for the week ending October 25, 1978, as constructive gross earnings for backpay purposes.

The facts reveal that there was insufficient work available to establish that mason discriminatee Serrett would actually have been employed from on or about March 6, 1978, to October 25, 1978. It will be recommended later that backpay allegations relating to Serrett be dismissed.

3. Order for computation of constructive gross earnings

The Respondent will be ordered to compute the constructive gross earnings for discriminatees Vedora and Woznick for the weeks ending March 15 and 29, 1978, and for the week ending May 24, 1978, in the manner and accord as set forth previously with the discussion of gross earnings for such weeks.

[22] The General Counsel does not contend that David worked during the week ending September 27, 1978.

4. Constructive gross earnings

In accordance with all of the findings above the constructive gross earnings for Vedora and Woznick are as follows:

Week Ending	*Vedora*	*Woznick*
3/8/78	$ 67.20 as computed	$ 67.20 as computed
3/15/78	per Order	per Order
3/22/78	341.66 as computed	341.66 as computed
3/29/78	per Order	per Order
1st Quarter Total	$408.86 plus computation for March 15 and 29, 1978	$408.86 plus computation for March 15 and 29, 1978

Week Ending	*Vedora*	*Woznick*
4/5/78	$ 119.16	$ 119.16
4/12/78	400.83	400.83
4/19/78	322.50	322.50
4/26/78	260.83	260.83
5/3/78	552.50	552.50
5/10/78	260.00	260.00
5/17/78	401.25	401.25
5/24/78	computed per Order	computed per Order
5/31/78	342.00	342.00
6/7/78	460.00	460.00
6/14/78	399.00	399.00
6/21/78	348.00	348.00
6/28/78	475.00	475.00
2d Quarter Total	$4,341.07 plus computation for week ending 5/24/78	$4,341.07 plus computation for week ending 5/24/78

Week Ending	*Vedora*	*Woznick*
7/5/78	$ 342.00	$ 342.00
7/12/78	474.00	474.00
7/19/78	451.00	451.00
7/26/78	212.50	212.50
8/2/78	181.66	181.66
8/9/78	120.00	120.00
8/16/78	200.00	200.00
8/23/78	--	--
9/6/78	170.00	170.00
9/13/78	360.00	360.00
9/20/78	360.00	360.00
9/27/78	200.00	200.00
3d Quarter Total	$3,071.16	$3,071.16

Week Ending	*Vedora*	*Woznick*
10/4/78	$ 217.50	$ 217.50
10/11/78	411.25	411.25
10/18/78	320.00	320.00
10/25/78	282.50	282.50
4th Quarter Total	$1,231.25	$1,231.25

5. The computation of backpay due Vedora

As previously set forth, the gross earnings for Vedora for the backpay period have been determined as to the amounts per week or as to the exact means of computation. The General Counsel has conceded certain interim earnings for Vedora during the backpay period, and no other proof thereof has been presented into the record. In accordance with the findings with respect to gross earnings and the conceded interim earnings, the following findings as to backpay due to Vedora are hereby made:

Qtr.	*Gross Earnings*	*Net Interim Earnings*	*Net Backpay*
1st	$ 408.86 plus amount computed per Order for weeks ending March 15 and 29, 1978	$0	$ 408.86 plus amount computed per Order for weeks ending March 15 and 29, 1978
2d	4,341.07 plus computation for week ending 5/24/78 per Order	2,981.99	1,359.08 plus computation for earnings for week ending 5/24/78
3d	3,071.16	4,150.11	0
4th	1,231.25	1,082.90	148.35

6. The computation of backpay due Woznick

As previously set forth, the gross earnings for Woznick for the backpay period have been determined as to the amounts per week or as to the exact means of computation. The General Counsel has conceded certain interim earnings for Woznick during the backpay period, and no other proof thereof has been presented into the record. In accordance with the findings with respect to gross earnings and the conceded interim earnings, the following findings as to backpay due to Woznick are hereby made:

Qtr.	*Gross Earnings*	*Net Interim Earnings*	*Net Backpay*
1st	$ 408.86 plus amount computed per Order for weeks ending March 15 and 29, 1979	$ 0	$ 408.86 plus amount computed for gross earnings for weeks ending March 15 and 29, 1979
2d	$4,341.07 plus amount computed for week ending 5/24/78 per Order	4,059.84	281.23 plus amount computed for week ending 5/24/78 for gross earnings per Order
3d	3,071.66	3,827.58	0
4th	1,231.25	1,196.20	35.05

ORDER[23]

Upon the basis of the foregoing findings and conclusions, it is ordered that the Respondent, Storto Sons Construction Co., Inc., Rochester, New York, its officers, agents, successors, and assigns, shall compute the gross earnings for Vedora and Woznick, in the manner set forth previously in the Decision of this matter, and shall pay to Philip DeSain, Herman Davis, Stephen Corcoran, Jr., Dominick Vedora, and John Woznick a sum of money equal to the composite sum of the following amounts indicated with respect to each, minus such deductions as may be required by Federal or state law and which are appropriately paid to such government.

A. The backpay due Philip DeSain on a quarterly basis is as follows with all interest to be computed in accord with the Board's decision in *Florida Steel Corporation*, 231 NLRB 651 (1977):[24]

1. 1977—4th Quarter—$1,270, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

2. 1978—1st Quarter—$2,047.62, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

3. 1978—2d Quarter—$1,429.94, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

B. The backpay due Herman Davis on a quarterly basis is as follows with all interest to be computed in accord with the Board's decision in *Florida Steel Corporation, supra*:[25]

1. 1978—1st Quarter—$3,442.67, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

2. 1978—2d Quarter—$2,679.67, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

3. 1978—3d Quarter—$2,762.06, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

4. 1978—4th Quarter—$3,530.23, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

C. The backpay due Stephen M. Corcoran on a quarterly basis is as follows with all interest to be computed in accord with the Board's decision in *Florida Steel Corporation, supra*:[26]

1. 1978—1st Quarter—$3,211.11, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

D. The backpay due Dominick Vedora on a quarterly basis is as follows with all interest to be computed in

[23] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[24] See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[25] See *Isis Plumbing & Heating Co., supra.*

[26] See *Isis Plumbing & Heating Co., supra.*

accord with the Board's decision in *Florida Steel Corporation, supra*:[27]

1. 1978—1st Quarter—a sum of money equal to $408.86 plus the amount computed for Vedora's gross earnings per Order for the weeks ending March 15 and 29, 1978, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

2. 1978—2d Quarter—a sum of money equal to $1,359.08 plus the amount computed for Vedora's gross earnings per Order for the week ending May 24, 1978, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

3. 1978—4th Quarter—$148.35, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

E. The backpay due John Woznick on a quarterly basis is as follows with all interest to be computed in accord with the Board's decision in *Florida Steel Corporation, supra*:[28]

1. 1978—1st Quarter—a sum of money equal to $408.86 plus the amount computed for Woznick's gross earnings per Order for the weeks ending March 15 and 29, 1978, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

2. 1978—2d Quarter—a sum of money equal to $281.23 plus the amount computed for Woznick's gross earnings per Order for the week ending May 24, 1978, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

3. 1978—4th Quarter—$35.05, plus interest thereon to accrue commencing with the last day of such quarter and continuing to date of payment.

IT IS FURTHER ORDERED that the backpay specifications regarding Serrett be dismissed. Jurisdiction in this proceeding is recommended to be retained for such other orders as may become necessary.

[27] See *Isis Plumbing & Heating Co., supra.*

[28] See *Isis Plumbing & Heating Co., supra.*

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT coercively interrogate applicants for employment concerning their union membership.

WE WILL NOT tell applicants for employment that they will not be hired because they are union members.

WE WILL NOT ask applicants for employment to withdraw their union membership in order to obtain employment.

WE WILL NOT discourage membership in Bricklayers, Masons, and Plasterers' Local Union No. 43 of the Finger Lakes Region, or Laborers Local 103, or any other labor organization, by refusing to hire members of those organizations or by otherwise discriminating against them in regard to the hire and tenure of their employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL make whole Phillip DeSain, Herman Davis, Stephen Corcoran, Dominick Vedora, John Woznick, and Harry Serrett, Jr., for any loss of pay and benefits which they have suffered by reason of the unfair labor practices which were found in this case, with interest.

STORTO SONS CONSTRUCTION CO., INC.